

STATE OF MICHIGAN
COURT OF APPEALS

JULIE L. LISTER,

Plaintiff-Appellee,

v

JOHN JACOBSON,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 265478

Baraga Circuit Court

LC No. 02-005142-DP

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right from an order of the circuit court denying his motion to change custody of the parties' minor child. We vacate the trial court's order and remand.

Initially, the parties agreed they would share joint legal and physical custody of their son, and parenting time was divided so that the child would see both parents every day. The court memorialized the parties' agreement in an order dated November 8, 2004, but, the parties often strayed from the order, leading to confusion and escalating conflicts. Eventually, the parties filed cross-motions on the issue of custody.

After a hearing on the matter, the trial court found that neither proper cause nor change in circumstances existed to modify the custody order pursuant to MCL 722.27. MCL 722.27(1)(c); *Terry v Affum (On Remand)*, 237 Mich App 522; 534-535; 603 NW2d 788 (1999). But despite finding neither proper cause nor change in circumstances, the trial court significantly changed the amount of parenting time allotted to defendant. This was clear legal error.

In *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), this Court set forth the standards of review applicable in custody appeals:

We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. *Id.* Questions of law are reviewed for clear

legal error. *Fletcher, supra*, 229 Mich App 24, citing MCL 722.28; MSA 25.312(8), and *Fletcher, supra*, 447 Mich at 881. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher, supra*, 229 Mich App 24, citing *Fletcher, supra*, 447 Mich at 881.

An existing custody or parenting time order may be modified or amended only “for proper cause or because of change in circumstances.” MCL 722.27(1)(c); *Terry, supra* at 534-535. The moving party “has the burden of proving by a preponderance of the evidence that either proper cause or change of circumstances exists *before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) (emphasis in original). From or review of the facts in this case we do not find that the trial court erred by concluding that defendant failed to prove by a preponderance of the evidence either proper cause or a change of circumstances. The evidence established long-standing problems between the parties for which both shared blame. When the trial court found no proper cause or change in circumstances, it inherently concluded that these problems did not, however, rise to the level of affecting this child, ie., demonstrate proper cause or change of circumstances. In order for this court to overrule the trial court’s finding in this regard, we would have to determine that the evidence adduced on the issue of proper cause or change of circumstances clearly preponderated in the opposite direction, as discussed previously. That we cannot do. Consequently, once the trial court determined that there was no proper cause or change in circumstances, it should have ended its analysis. Moreover, because we find no error in the trial court’s findings on this initial inquiry, its decision is dispositive of this case, and we need not address any of the other issues raised on appeal.

We vacate the trial court’s order and remand for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Joel P. Hoekstra

Markey, J. did not participate.